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impact of the *DeSimone* holding may be of considerable importance to the law of zoning as applied to multiple-family dwellings. The holding in *DeSimone* reflects a marked change in the attitude of the courts from that of earlier years. The view adopted in *DeSimone*, that multiple-family dwellings can be employed as an instrument of social policy and can result in a benefit to the public, represents a clear contrast to *Euclid's* concept of the parasitic apartment.

JOHN A. PARKINS, JR.

ART INVESTMENT EXPENSE DEDUCTIONS AND THE PRIMARY PURPOSE REQUIREMENT

In recent years, collecting works of art has become an increasingly popular form of investment.¹ As with any investment, however, consideration must be given to its income tax consequences. In this regard, a taxpayer will not be entitled to deduct the expenses of maintaining his investment property pursuant to section 212 of the Internal Revenue Code of 1954² [hereinafter referred to as the Code] if such property is held "primarily as a sport, hobby, or recreation."³ Therefore, the

¹Many investors have grown discouraged by a faltering stockmarket and concluded that spiraling art prices represented an excellent hedge against inflation. NEWSWEEK, Sept. 22, 1969, at 97; U.S. NEWS & WORLD REPORT, June 8, 1970, at 90.

²The Internal Revenue Code provides:

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year —

(1) for the production or collection of income;

(2) for the management, conservation, or maintenance of property held for the production of income....

INT. REV. CODE OF 1954, § 212 (emphasis added).

³The Treasury Regulation provides:

(c) Expenses of carrying on transactions which do not constitute a trade or business of the taxpayer and are not carried on for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income, but which are carried on *primarily as a sport, hobby, or recreation* are not allowable as nontrade or non-business expenses. The question whether or not a transaction is carried on primarily for the production of income or for the management, conservation, or maintenance of property held for the production or collection of income, rather than primarily as a sport, hobby, or recreation, is not to be determined solely from the intention of the taxpayer but rather *from all the circumstances of the case*. For example, consideration will be given to the record of prior gain or loss of the taxpayer in the activity, the relation between the type of activity and the principal occupation of the

art investor who wishes to deduct the expenses of maintaining his art investments must be able to prove⁴ that his investment purpose is primary to whatever pleasure he receives from owning art.⁵ If the art investor is successful in satisfying the court as to his purpose, he will be entitled to deduct expenses for the "management, conservation, or maintenance of property held for the production of income"⁶ However, as was illustrated by the decision of the United States Court of Claims in *Wrightsmen v. United States*,⁷ the art investor may encounter peculiar difficulties in satisfying the court as to his primary purpose.⁸

The plaintiffs in *Wrightsmen* were wealthy art enthusiasts⁹ who maintained an intricately catalogued, internationally famous collection of nineteenth century French art.¹⁰ Over three quarters of this multi-million dollar collection¹¹ was housed in a New York apartment where

taxpayer, and the uses to which the property or what it produces is put by the taxpayer. (emphasis added).

Treas. Reg. § 1.212-1(c) (1957).

⁴The burden of proof is always upon the taxpayer claiming deductions to prove that the facts of his situation meet the requirements of the statute. *Hirsch v. Commissioner*, 315 F.2d 731, 738 (9th Cir. 1963); *Wilson v. Eisner*, 282 F. 38, 42 (2d Cir. 1922); see *Commissioner v. Heininger*, 320 U.S. 467 (1943).

⁵The court ruled in *Coffey v. Commissioner*, 141 F.2d 204 (5th Cir. 1944), that in a hobby "the objective is pleasure or relaxation . . ." *Id.* at 205.

⁶INT. REV. CODE OF 1954, § 212(2); note 2 *supra*.

⁷428 F.2d 1316 (Ct. Cl. 1970).

⁸In this case, the court accepted the definition of "primarily" used by the Supreme Court in *Malat v. Riddell*, 383 U.S. 569 (1966): "We hold that, as used in § 1221(1), 'primarily' means 'of first importance' or 'principally'." *Id.* at 572. Although the Supreme Court was addressing itself to a capital gain provision, the *Wrightsmen* court was of the opinion that this definition was equally applicable to the use of the term in Treas. Reg. § 1.212-1(c). 428 F.2d at 1320 n.5.

⁹Charles and Jayne Wrightsmen began to acquire art works as a hobby in 1947. The success of Charles Wrightsmen in the oil business during the following years made it possible for them to invest millions of dollars. After thoroughly studying the more conventional forms of investment and refusing to follow the recommendations of many financially astute acquaintances, the Wrightsmens decided that collecting art was a most attractive outlet for their surplus capital. Their enthusiasm for art is reflected by numerous facts including their constant association with well known art experts, their frequent travel to places of artistic interest, and their extensive self-education in their chosen field. *Id.* at 1317-21.

¹⁰A catalog of the Wrightsmen Collection fills twenty-six looseleaf volumes and requires a shelf space of about five feet. Mr. Francis J. B. Watson, the Surveyor of the Queen's Works of Art and Director of the Wallace Collection of London, was in the process of producing for the Metropolitan Museum a five volume treatise on the Wrightsmen Collection at the time of the trial. *Id.* at 1319.

¹¹By 1967, the Wrightsmen Collection was valued for insurance purposes in excess of \$16.8 million. *Id.* at 1317.

the plaintiffs lived for no more than thirty days each year.¹² The remainder of the collection was kept in their Florida home or was on loan to the Metropolitan Museum in New York.¹³ This action arose when the plaintiffs sought to recover alleged overpayments of federal income tax.¹⁴ These overpayments represented claimed deductions denied the Wrightsmans for expenses incurred in maintaining their art collection.¹⁵

Although the tax commissioner had been satisfied that the plaintiffs' evidence demonstrated a primary investment purpose,¹⁶ the Court of Claims reversed his decision on appeal by the Internal Revenue Service. This court found that the plaintiffs' art collection was held primarily for pleasure.¹⁷ Consequently, all expenditures incidental to the Wrightsmans' art collection were ruled to be nondeductible, personal expenses under section 262 of the Code.¹⁸ One judge dis-

¹²It was the Wrightsmans' custom to reside from late November until late April at their home in Florida. Beginning about the first of May they would live in their New York apartment. From June until fall they would travel abroad. *Id.* at 1318.

¹³On the basis of insurance evaluation, 77.8 percent of the collection is housed in the Wrightsmans' New York apartment, 17.7 percent in their Florida home, and about 4.5 percent is on loan to the Metropolitan Museum in New York. *Id.* at 1321.

¹⁴The amounts of these alleged overpayments were \$5,911.20 for 1960 and \$21,199.78 for 1961, plus interest. *Id.* at 1317.

¹⁵These expenses were claimed as deductions pursuant to section 212 of the Internal Revenue Code. Note 2 *supra*. Included among these expenses were the costs of insurance, subscriptions, services, shipping costs, miscellaneous expenses, and maintenance (which included the costs of air conditioning and humidity controls). These expenses are described in detail in the commissioner's report. *Wrightsmans v. United States*, 7 CCH 1969 STAND. FED. TAX REP. ¶ 7910.

¹⁶The tax commissioner had been satisfied by the plaintiffs' evidence that the primary purpose of their art collecting activity was to make a profit. This evidence included the following facts: The plaintiffs had openly and frequently expressed an intention to collect art as an investment; they followed the identical business procedures in purchasing new additions for their collection as they used to secure other investments; the investment potential of each item was carefully recorded; the value of their art investments had increased substantially; and the plaintiffs had demonstrated that they would sell and have sold items which failed to increase in value. Furthermore, the commissioner noted that the plaintiffs' conduct had been fully consistent with their expressed intentions. Although he acknowledged that the Wrightsmans received a certain amount of pleasure from their collection, the commissioner analogized their activity to that of the part-time farmers for whom similar deductions were allowed whenever their activities were found to be carried on primarily for profit. *Wrightsmans v. United States*, 7 CCH 1969 STAND. FED. TAX REP. ¶ 7910.

¹⁷According to the majority, "[t]he complete record *does* establish, to the contrary [of investment being the primary purpose of the plaintiffs], personal pleasure or satisfaction as plaintiffs' primary purpose." 428 F.2d at 1322.

¹⁸INT. REV. CODE OF 1954, § 262 provides: "Except as otherwise expressly pro-

sented, noting that this was an extremely close decision in which great weight should have been given to the opinion of the commissioner, who had the advantage of being able to judge the demeanor and credibility of the parties.¹⁹

In reaching its decision, the majority refused to be bound by either of the government's proposed theories as to how the requirements of the regulation should be met. One theory maintained that the plaintiffs should be denied recovery since they had not shown "any action on their part inconsistent with the holding of their collection for pleasure. . . ." ²⁰ The other theory, which the court called the "physical segregation-pleasure preclusion standard," ²¹ was an attempt by the government to devise a definite rule for determining the art investor's primary purpose. This rule, simply stated, would prevent art investors from deducting expenses related to their collections unless they separated themselves from their art works in such a way as to prove that personal pleasure was not their most important consideration. ²² Since the mere receipt of pleasure from an activity is insufficient to prove that it is not carried on for the production of income, ²³ the

vided in this chapter, no deduction shall be allowed for personal, living, or family expenses."

The plaintiffs in the principal case had also claimed the \$1,000 maximum deduction for a capital loss resulting from the sale of some art items. 428 F.2d at 1317 n.2. The government conceded that the plaintiffs were entitled to recover on this claim "if it be determined they were investors in their works of art." *Id.* It is not clear whether this deduction was granted in that the court recognized the existence of an investment purpose. *Id.* at 1322. No further mention of this claim is made in the opinion. Presumably, since the court ruled that the plaintiffs were not *primarily* investors, this loss was also considered as a personal hobby expense and the deduction was denied.

¹⁹428 F.2d at 1323-24. The commissioner's determination carries a presumption of validity. *Drybrough v. Commissioner*, 376 F.2d 350, 360 (6th Cir. 1967); *Cf. Commissioner v. Duberstein*, 363 U.S. 278, 289-91 (1960); *Besseney v. Commissioner*, 379 F.2d 252 (2d Cir. 1967); *Imbesi v. Commissioner*, 361 F.2d 640, 643 (3d Cir. 1966); *FED. R. CIV. P.* 52(a).

²⁰428 F.2d at 1319.

²¹*Id.* at 1320.

²²For authority to support this rule, the government cited *Juliet P. Hamilton*, 25 B.T.A. 1317 (1932), in which a taxpayer was denied a deduction for the loss on the sale of a painting that she displayed in her personal residence, and *R. Foster Reynolds*, 14 P-H Tax Ct. Mem. ¶ 45,276 (1945) *aff'd*, 155 F.2d 621 (1st Cir. 1946), in which a taxpayer was allowed a deduction for the sale of a diamond necklace kept in a safety deposit box and at no time used by the taxpayer or any member of his family. The majority in *Wrightman* found neither decision controlling, distinguishing *Hamilton* upon a lack of an investment-type activity, and *Reynolds* upon its absence of any personal use. 428 F.2d at 1323.

²³There is no duty imposed upon the plaintiffs in such cases to prove that their activity is not pleasurable. It may be pleasurable so long as it is not carried on as a mere hobby. *See, e.g., Commissioner v. Field*, 67 F.2d 876 (2d Cir. 1933); *Worrell v. United States*, 254 F. Supp. 992 (S.D. Tex. 1966); *Wright v. United States*, 249 F. Supp. 508 (D. Nev. 1965).

court refused to recognize a legal basis for the application of either theory.²⁴ Instead, the majority ruled that the primary purpose must be determined "by consideration of all the circumstances," the only standard specifically mentioned in the applicable Treasury Regulation.²⁵

Determining when a taxpayer should be permitted deductions for expenses incurred in part-time activities has been a problem of the courts for nearly a half century.²⁶ In one of the earliest cases, *Thacher v. Lowe*,²⁷ Judge Learned Hand expressed this view of the situation:

[W]hile I should be the last to say that the making of a profit was not in itself a pleasure, I hope I should also be one of those to agree there were other pleasures than making a profit. Indeed, it makes no difference whether a man is engaged in business which gives him pleasure, if it be a business But it does make a difference whether the occupation . . . can honestly be said to be carried on for profit.²⁸

In many of the decisions that followed *Thacher*, the courts were satisfied with evidence of the mere existence of a sincere, profit-making intent.²⁹ Determining whether there was an actual intent to realize income from an activity placed the court in the difficult position of having to judge the petitioner's state of mind.³⁰ Often the courts attempted to distinguish a taxpayer's actual intent from his expressed intent to make a profit by considering the circumstances of his activity.³¹ A var-

²⁴The majority stated that it was unaware of any authority "for the interpretations which defendant places upon the applicable legal standard." 429 F.2d at 1320.

²⁵Treas. Reg. § 1.212-1(c) (1957); note 3 *supra*.

²⁶Such problems first began to arise under the Revenue Act of 1916, which allowed deductions from uncompensated losses incurred in transactions entered into for profit. *See, e.g.,* *Wilson v. Eisner*, 282 F. 38 (2d Cir. 1922); *Plant v. Walsh*, 280 F. 722 (D. Conn. 1922).

²⁷288 F. 994 (S.D.N.Y. 1922).

²⁸*Id.* at 995. The petitioner in *Thacher* was a lawyer who attempted to deduct losses sustained in gentlemanly farming.

²⁹In many of the "hobby loss" cases, the taxpayer's possibility of making a profit seemed so remote under the circumstances that the court found reason to suspect that he had never intended to make a profit. *E.g.,* *Brodrick v. Derby*, 236 F.2d 35 (10th Cir. 1956) (oilman incurred consistent losses in raising harness horses); *Farish v. Commissioner*, 103 F.2d 63 (5th Cir. 1939) (oilman incurred consistent losses raising polo ponies); *DuPont v. Commissioner*, 36 B.T.A. 223 (1937) (industrial tycoon equipped a financially disastrous expedition to find the Central American "White Indian").

³⁰*See, e.g.,* *Weir v. Commissioner*, 109 F.2d 996 (3d Cir. 1940); *George F. Tyler*, 16 P-H Tax Ct. Mem. ¶ 47,058 (1947).

³¹As the court held in *Tatt v. Commissioner*, 166 F.2d 697 (5th Cir. 1948), "intent may be proved by circumstances, and that a party's testimony as to his intent may be rebutted by proof of circumstances which are inconsistent therewith." 166 F.2d at 698. *See, e.g.,* *Foran v. Commissioner*, 165 F.2d 705 (5th Cir. 1958); *Brodrick v. Derby*, 236 F.2d 35 (10th Cir. 1956),

iety of factors have been considered in determining this actual intent, such as the carrying on of a businesslike operation,³² a conscientious effort to succeed in that business,³³ and, if not an actual financial gain, at least the hope that a profit would be realized in the near future.³⁴ When such circumstances were consistent with the petitioner's expressed intent to make a profit, his actual intent was recognized by the court and deductions for his expenses and losses³⁵ were allowed.

Since 1957, section 1.212-1 (c) of the Treasury Regulations has specifically stated that the purpose for which property is being held is "not to be determined solely from the intention of the taxpayer"³⁶ This provision would appear to make the taxpayer's intent to make a profit merely a factor in determining his purpose. However, court-determined actual intent to make a profit is so closely akin to profit-making purpose³⁷ that the cases which utilized the former criterion

³²Four indicia of an intention to maintain a profit-making business were described in *Amos S. Bumgardner*, 13 CCH Tax Ct. Mem. ¶ 20,151 (1954): (1) a thorough preliminary exploration of the field and the possibilities for profit; (2) the consultation of experts and the hiring of qualified help or assistants; (3) considerable personal attention to the enterprise; and (4) a businesslike method of accounting for income and expenses. As was pointed out by the tax commissioner, the facts of the principal case satisfied all of these considerations. For additional characteristics of a businesslike operation, see 5 J. MERTENS, *THE LAW OF FEDERAL INCOME TAXATION* § 28.73 (1969).

³³*See, e.g., Doggett v. Burnett*, 65 F.2d 191 (D.C. Cir. 1933); *Laura M. Curtis*, 28 B.T.A. 631 (1933).

³⁴*See, e.g., Hirsch v. Commissioner*, 315 F.2d 731, 736 (9th Cir. 1963); *Higgins v. United States*, 75 F. Supp. 252, 255 (Ct. Cl. 1948); *DuPont v. United States*, 234 F. Supp. 681, 686 (D. Del. 1964).

³⁵INT. REV. CODE OF 1954, § 165 provides in part:

(a) General rule.—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

(c) Limitation on losses of individuals—In the case of an individual, the deduction under subsection (a) shall be limited to—

(1) Losses incurred in a trade or business;

(2) Losses incurred in any transaction entered into for profit, though not connected with a trade or business

Section 165(c) may be traced to the original revenue act. Note 24 *supra*. Since the taxpayer must show that he has entered into a transaction for profit in order to claim a loss deduction the problems that arise under this provision are similar to those that arise in interpreting Treasury Regulation § 1.212-1(a). *Cf. Carkhuff v. Commissioner*, 425 F.2d 1400 (6th Cir. 1970) (the court used the precedent of a bad debt case, *Hirsch v. Commissioner*, 315 F.2d 731 (9th Cir. 1963), to declare that the predominant purpose of property for which expense deductions are claimed must be to derive income).

³⁶Treas. Reg. § 1.212-1(c) (1957); note 3 *supra*.

³⁷The distinctions in meaning between such terms as "intent," "motive," and "purpose" are often unclear. Note the discussion of Judge Clark in *Weir v. Commissioner*, 109 F.2d 995 (3d Cir. 1940), where intent is given three distinct legal

before the Regulation are still helpful in discussing the problems that arise under it.

In past cases, courts have been most inclined to permit deductions for maintenance expenses when there was no personal use of the property held for the production of income.³⁸ Thus, while the expenses of decorating a personal residence are normally nondeductible,³⁹ the petitioner in *Cecil v. Commissioner*⁴⁰ was permitted to deduct the cost of interior decorations when they were necessary to open a mansion for paid, public admission. In reaching this result, the circuit court noted that the property was not the personal residence of the taxpayer, and would not be used for her "personal pleasure, or social diversion, or as a hobby . . ."⁴¹

Confusing the issue, however, is the fact that there have been decisions where the taxpayer's personal use of pleasurable investment property did not preclude deductions.⁴² In *George F. Tyler*,⁴³ the Tax Court acknowledged that the plaintiff, who invested heavily in stamps,⁴⁴ received personal pleasure from his collection. However, the court was satisfied that profit was his primary purpose in that he participated in few of the activities of a stamp hobbyist.⁴⁵ Tyler did not subscribe to any philatelic publications, join any stamp collecting organizations, or meet regularly with other stamp collectors.⁴⁶ Thus, he was able to satisfy the court of his profit-making purpose by demonstrating actions on his part that were inconsistent with the holding of a stamp collection for pleasure.⁴⁷

While the court in *Tyler* interpreted *limited* involvement as an in-

meanings. Cf. 428 F.2d at 1323 (dissenting opinion) ("investment intent" and "investment purpose" used interchangeably); *Besseney v. Commissioner*, 379 F.2d 252, 256 (2d Cir. 1967) ("intention" and "motive" used interchangeably).

³⁸See, e.g., *Hopkins v. Commissioner*, 15 T.C. 160 (1950); R. Foster Reynolds, 14 P-H Tax Ct. Mem. ¶ 45,276 (1945).

³⁹See *Jones v. United States*, 279 F. Supp. 772 (D. Del. 1968); *Kirkland v. United States*, 267 F. Supp. 259 (D. Neb. 1967).

⁴⁰100 F.2d 896 (4th Cir. 1939).

⁴¹*Id.* at 900.

⁴²The best examples are the farm cases where the taxpayer was successful in claiming loss deductions in spite of his personal, social, or recreational use of the farm. See, e.g., *Thomas Watson*, 12 P-H Tax Ct. Mem. ¶ 43,441 (1943); *Walter P. Temple*, 10 B.T.A. 1238, 1241 (1928).

⁴³16 P-H Tax Ct. Mem. ¶ 47,058 (1947).

⁴⁴*Tyler* had expended \$448,037.97 in accumulating his collection of rare stamps. *Id.* at 225.

⁴⁵*Id.* at 228.

⁴⁶It was not unnecessary for *Tyler* to study philately extensively since his investments were selected by an agent who was an expert. *Id.* at 224-25.

⁴⁷Cf. note 23 and accompanying text *supra*.

dication that profit was the petitioner's "principal motivation,"⁴⁸ other courts have considered an *active* involvement as being indicative of the same intent. The latter view is manifested by *Laura M. Curtis*,⁴⁹ a case in which the petitioner was interested in horses and kept a stable. The Tax Court ruled that her activity was primarily for profit although she kept no books and made no profits. The court was impressed by the extensive time that she devoted to this activity.⁵⁰ The fact that the Tax Court was able to find a profit-making intent from opposite types of involvement may best be explained by the comparative wealth of the two parties. Unlike Tyler, the taxpayer in *Curtis* was not a multimillionaire who could afford to devote a great deal of time to an unprofitable venture.⁵¹ As a federal judge noted in *Besseney v. Commissioner*,⁵² a case in which a wealthy woman was denied deductions for a horse breeding activity, "the Tax Court's approach to a study of the motives of the very rich would seem to be materially different from the approach to a study of the motives of the rest of us."⁵³ It appears much easier for courts to find that a wealthy man becomes involved in a pleasurable investment activity primarily for pleasure.⁵⁴ This theory finds support in cases where the plaintiff's high income and ability to withstand losses have been cited as indications that he was not primarily concerned with profits.⁵⁵ Therefore, it appears that the greater the taxpayer's wealth, the more difficult it is for him to prove by all the circumstances that profit, and not pleasure, is the primary purpose of his activity.

By insisting that the plaintiffs must prove a *primary* investment

⁴⁸16 P-H Tax Ct. Mem. ¶ 47,058 at 228.

⁴⁹28 B.T.A. 631 (1933).

⁵⁰*Id.*

⁵¹Tyler, a banker, invested \$7,926,533.76 in securities during the same period in which he invested nearly half a million in his stamp collection. 16 P-H Tax Ct. Mem. ¶ 47,058 at 228. Curtis, a shopkeeper, was unable to withstand too many losses and was eventually forced to give up her stable. 28 B.T.A. at 631-32.

⁵²379 F.2d 252 (2d Cir. 1967).

⁵³*Id.* at 259 (concurring opinion).

⁵⁴As was noted by the court in *Whitman v. United States*, 248 F. Supp. 845 (W.D. La. 1965), "surely it is easier to hold that an executive of General Motors, a banker, or a coupon clipping fox hunter has engaged in farming for pleasure only, than a construction worker whose wealth is apparently commensurate." *Id.* at 854. In accord with this observation was *Eugene J. Davis*, 35 P-H Tax Ct. Mem. ¶ 66,116 (1966), where the Tax Court noted a construction engineer's "modest means" in finding that he operated his unsuccessful farm for profit. *Id.*

⁵⁵See, e.g., *Besseney v. Commissioner*, 379 F.2d 252 (2d Cir. 1967); *Ellen R. Schley*, 34 P-H Tax Ct. Mem. ¶ 65,111 (1965). *But see Commissioner v. Widener*, 33 F.2d 833 (3d Cir. 1929).

purpose,⁵⁶ the *Wrightsmen* court was able to recognize the existence of such a purpose without granting the plaintiffs the benefit of a deduction.⁵⁷ However, a careful reading of section 1.212-1 (c) reveals that while the term "primarily" is used several times, the regulation does *not* say that property held for the production of income must be held *primarily* for the production of income. Instead, it insists only that such property should *not* be held "*primarily* as a sport, hobby, or recreation."⁵⁸ Therefore, although the *Wrightsmen* court ruled that the plaintiffs "failed to sustain their burden of proving the primacy of their investment purpose,"⁵⁹ it can be argued that the only burden of proof actually imposed upon the plaintiffs by the regulation is that they must prove they did not hold art works primarily for pleasure. Since the court found that personal pleasure was the plaintiffs' primary purpose,⁶⁰ the identical result would have been reached under either interpretation of the regulation. The difference, however, could affect a future petitioner's approach. If he were only required to prove that pleasure was not his primary purpose, the best methods for doing this are suggested by the alternate theories proposed by the government in the principal case.⁶¹

The first theory, which would grant deductions to the art investor who is able to demonstrate actions that are inconsistent with the holding of art works for pleasure, is similar to the method used by the petitioner in *Tyler* to prove that he was not primarily a hobbyist.⁶² Since devoting a great deal of time to the study of art would appear to be as beneficial to the prudent art investor as it would be enjoyable to the

⁵⁶428 F.2d at 1320.

⁵⁷The following adaptation from Sweeney, *The Farm Loss Deduction*, 53 A.B.A.J. 446 (1967), is an example of how a high-income taxpayer might benefit from such a deduction: If an art investor is in the seventy percent bracket with most of his income from other sources, and his art investment expenses exceed the income of his collection in a particular tax year by \$20,000, then he could claim this amount as expenses that are necessary to the maintenance of investment property and offset it against his other income. He is out of pocket \$20,000, but he has recouped seventy percent of that amount and it actually costs him only thirty cents for every dollar that is spent on his collection. That amount is more than recovered through long-term appreciation in the value of the art works. The net result is that a wealthy art investor can maintain a substantial collection and divert the major portion of its maintenance costs to the government.

⁵⁸Note 3 *supra*.

⁵⁹428 F.2d at 1323.

⁶⁰*Id.* at 1322.

⁶¹Notes 20 and 21 and accompanying text *supra*.

⁶²Note 45 *supra*.

art hobbyist,⁶³ the method of satisfying the requirement of the regulation would only rarely be available to the art investor.

The second theory, which would require the art investor to show a physical separation from his art works, could be given wider application. Although Treasury Regulation 1.212-1 (c) provides that consideration will be given to the uses to which the investment property is put, it gives no guidance as to how these uses are to be judged.⁶⁴ The determination of when the taxpayer's use of property indicates that it is being held primarily as a sport, hobby, or recreation is apparently a matter left to the discretion of the court. Thus, the Court of Appeals for the Sixth Circuit recently held in *Carkhuff v. Commissioner*⁶⁵ that four months personal use of a vacation cabin was sufficient to preclude the taxpayer from claiming deductions for the expenses of maintaining the cabin as a rental property during other times of the year.⁶⁶ And in the principal case, the court found the Wrightsmans' personal use of their collection to be "extensive"⁶⁷ although they lived in the apartment where the major portion of the collection was housed for only one month each year.⁶⁸ It is apparent, therefore, that some courts will consider even limited personal use of pleasurable investment property sufficient to preclude the taxpayer's claim for deductions. Without a definite rule, there is no way for the art investor to judge when his personal use of his investments will preclude his claims for deductions.⁶⁹

In *Carkhuff*, the court of appeals ruled that the "predominant purpose"⁷⁰ of investment property must be to derive income. To support

⁶³As was noted in the principal case, Charles Wrightsman believed that thorough knowledge of an investment was a requisite factor to financial success. 428 F.2d at 1317. Unlike Tyler, the Wrightsmans were deeply involved in the subject matter of their investment. They subscribed to every major art periodical, maintained an extensive art library, and associated with a large number of noted art experts. Indeed, they had become recognized experts in their own right. Brief for the Plaintiff at 10-16, *Wrightsmans v. United States*, 428 F.2d 1316 (Ct. Cl. 1970).

⁶⁴Note 3 *supra*.

⁶⁵425 F.2d 1400 (6th Cir. 1970).

⁶⁶*Id.* at 1405. The Carkhuffs made their cabin available for rent at least eight months a year. But in ruling that a primary profit intent had not been demonstrated, the court observed, among other things, that "[i]t is noteworthy that of four and one-half months of peak rental periods, taxpayers reserved the cottage for their personal use for two of those months..." 425 F.2d at 1405.

⁶⁷428 F.2d at 1321.

⁶⁸Note 10 *supra*.

⁶⁹The majority in *Wrightsmans* seemed content to leave the issue in an unsettled state when it reached the following conclusion:

This, despite defendant's urging that "the issue [must] not be left to a miscellaneous assortment of factors for varying judgment in each case." Clearly, we think, by the nature of the issue it must.

428 F.2d at 1323.

⁷⁰425 F.2d at 1404.

this rule, the court cited *Hirsch v. Commissioner*⁷¹ and Treasury Regulation 1.212-1. Although decided in 1963, the *Hirsch* case interpreted the bad debt section of the Internal Revenue Code of 1939⁷² and was therefore not concerned with the meaning of the present regulation. As has been pointed out,⁷³ 1.212-1 (c) does not clearly support such a rule. Furthermore, a federal district court expressed direct opposition to the *Hirsch* ruling a year later in *DuPont v. United States*.⁷⁴ The court stated:

A rule which would require that the profit motive dominate all other considerations . . . is not a realistic test. It is enough, as many of the cases have recognized, that a taxpayer have a bona fide interest and purpose in making the venture a profitable one. If he has, the fact that he also obtains non-monetary rewards is irrelevant.⁷⁵

In spite of these objections, however, the recent acceptance of the primary purpose requirement by both the Sixth Circuit and the Court of Claims is likely to make this rule established law.⁷⁶

Because of the pleasure inherent in exposure to works of art and the resulting difficulties in proving a primary investment purpose, the art investor who wishes to be assured that his expenses will be deductible may find it necessary as a practical matter to segregate himself physically from his collection. While it may appear harsh in a cultural sense to regard art objects as purely monetary commodities that must

⁷¹315 F.2d 731 (9th Cir. 1963). In this case, the court refused to allow the taxpayer to deduct the money he had expended on a racing association since the petitioner had not provided sufficient evidence to prove these expenses were incurred in carrying on a trade or business. The following language of the *Hirsch* court influenced the *Carkhuff* decision:

While the expectation of the taxpayer need not be reasonable, and immediate profit from the business is not necessary, nevertheless, *the basic and dominant* intent behind the taxpayer's activities, out of which the claimed expenses or debts were incurred, must be *ultimately to make a profit* on income from those very same activities.

315 F.2d at 736 (emphasis added). *Accord*, *Carkhuff v. Commissioner*, 425 F.2d 1400, 1404 (6th Cir. 1970); *Lamont v. Commissioner*, 339 F.2d 377, 380 (2d Cir. 1964); *Wright v. United States*, 249 F. Supp. 508, 513 (D. Nev. 1965).

⁷²INT. REV. CODE OF 1939, ch. 1, § 23.

⁷³Note 58 and accompanying text *supra*.

⁷⁴234 F. Supp. 681 (D. Del. 1964).

⁷⁵*Id.* at 685.

⁷⁶*See* *Lamont v. Commissioner*, 339 F.2d 377, 380 (2d Cir. 1964); *Godfrey v. Commissioner*, 335 F.2d 82, 84 (6th Cir. 1964); *Wright v. United States*, 249 F. Supp. 508, 513 (D. Nev. 1965). In accord with the view expressed in *DuPont v. United States*, 234 F. Supp. 681 (D. Del. 1964), are many of the older cases. *See, e.g.*, *Deering v. Blair*, 23 F.2d 975, 976 (D.C. Cir. 1928); *Thacher v. Lowe*, 288 F. 994 (S.D.N.Y. 1922).

languish in the depths of a safety deposit box,⁷⁷ the physical segregation-pleasure preclusion standard rejected by *Wrightsmen* could function to the public good if art investors were allowed to deduct the costs of maintaining their collections in public places for the free enjoyment of the community. A system of this nature would make it easier for the courts to recognize the true art investor. It would also encourage the art investor not to hoard art treasures in his personal residence. Furthermore, this suggestion could benefit art museums and other public institutions by enabling them to depend upon art investors for loaned exhibits.⁷⁸ At the present time, however, deductions are not usually allowable for the maintenance of property whose free use has been contributed to nonprofit organizations.⁷⁹

For the art collector who would find it difficult to demonstrate the circumstances necessary to show a primary investment purpose, a new section of the Code, section 183,⁸⁰ offers a possible alternative. This provision allows deductions for an activity that is not engaged in for profit, but only to the extent of the taxpayer's gross income from that activity.⁸¹ Since there is no necessity that the taxpayer demonstrate a profit intent, the primary purpose requirement may be avoided. It is necessary, however, that there be income from this activity; and though

⁷⁷SATURDAY REVIEW, Jan. 31, 1970, at 61.

⁷⁸In the *Wrightsmen* situation, for example, only the expenses for maintaining the 4.5 percent of the collection that was on loan to the Metropolitan Museum would be deductible if such a system were put into effect. Note 13 *supra*.

⁷⁹The taxpayer will not receive a charitable deduction for the contribution of the mere use of property. INT. REV. CODE OF 1954, § 170(f)(3); see, e.g., *Orr v. United States*, 226 F. Supp. 809 (M.D. Ala. 1963), *aff'd*, 343 F.2d 553 (5th Cir. 1965); *Mitchell v. Commissioner*, 42 T.C. 953 (1964); I.T. 3918, 1948-2 CUM. BULL. 33. It should be noted however, that charging admission for the showing of an art collection might be an excellent circumstance for proving a primary intention of holding art works for profit. Cf. *Cecil v. Commissioner*, 100 F.2d 896 (4th Cir. 1939).

⁸⁰INT. REV. CODE OF 1954, § 183 provides in part:

SEC. 183. ACTIVITIES NOT ENGAGED IN FOR PROFIT.

(a) General rule.—In the case of an activity engaged in by an individual or an electing small business corporation (as defined in section 1371(b)), if such activity is not engaged in for profit, no deduction attributable to such activity shall be allowed under this chapter except as provided in this section.

(b) Deductions allowable.—In the case of an activity not engaged in for profit to which subsection (a) applies, there shall be allowed—

• • • •

(2) a deduction equal to the amount of the deductions which would be allowable under this chapter for the taxable year only to the extent that the gross income derived from such activity for the taxable year exceeds the deductions allowable by reason of paragraph (1).

⁸¹INT. REV. CODE OF 1954, § 183(b)(2); note 80 *infra*.